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A CLASSIFICATION OF POOLS AND ASSOCIATIONS BASED ON AMERICAN EXPERIENCE[1]

In his study of combinations and trusts the writer has been much impressed by the repeated recurrence in various pools and associations of certain structural characteristics and peculiarities. It was this that first gave the idea of attempting a logical classification of this type of industrial combination. But some hesitancy was felt in undertaking such a task. In the first place, such a study involves the repetition, in many cases, of well-known facts. In the second place, the character of certain agreements is such as to make satisfactory classification most difficult. In some cases this is due to the paucity of facts in regard to the combination.[2] In others it arises from the ambiguous character of the agreements themselves or because one must interpret the intention solely from the text of such agreements with no certainty that his diagnosis is the correct one.[3] Despite these considerations, the attempt to develop a logical and comprehensive classification of this type of combination may, it is hoped, prove of both interest and value.

American experience shows that pools and associations fall into one of two broad general classes, *i.e.*, *simple* pools or *mixed* pools. For example, each of several manufacturers agrees to sell only a certain percentage of all the goods sold by the group, or a group of manufacturers agree among themselves that they will sell their goods only at certain prices. In either case the

[1] Several of the agreements discussed in this article are reprinted in *Industrial Combinations and Trusts,* edited by W. S. Stevens (New York: Macmillan. 1913. Pp. xiv, 593).

[2] For this reason several pools and associations have been eliminated from this study. Among them will be found the Wall Paper, Sand Paper, Upholsterers' Felt, and Incandescent Lamp Manufacturers' associations.

[3] A good instance of the error that may result from literal interpretation is the Kentucky Distillers Association (see *infra*). Here the text of the agreement indicates output division. Only an examination of testimony reveals how mistaken such a classification would be.

pool is *simple* or *simplex* according to the classification the writer has developed.

Suppose, however, that the group of manufacturers instead of doing only one of these two things had agreed to do both. In that case the pool or association[4] would no longer be a *simple* but a *mixed* pool. And, as it contemplates two things, *i.e.*, dividing output and fixing prices, it may be termed a *duplex* pool. Add a third object and the pool, still, of course, a *mixed* pool, becomes *triplex* and so on. All these mixed forms, *duplex*, *triplex*, and *quadruplex* pools, are merely varied combinations of the simple or *simplex* pool which has seven distinct type forms as follows:

I. Output[5] or traffic division;
II. Output curtailment;
III. Territorial division;
IV. Joint sales;
V. Price;
VI. Clearing house;
VII. Legitimate trader.

Simplex Pools

I. Output or traffic division.

The earliest pools in the United States, of which there is any definite record, were those formed in the cordage industry. So far as the evidence shows, they were *simplex* pools for the purpose of dividing the output.[6] The first of them was organized about 1860 and they continued a more or less intermittent existence until the formation of the National Cordage Company many years later. The manufacturers met together and divided the business of the country according to certain percentages. Each manufacturer was required to make his returns monthly to a supervisor. If he had exceeded his percentage he was required to pay to the supervisor a certain amount per pound to balance the excess. Those, on the other hand, who fell below their percentage allotment drew upon the supervisor to make up the deficiency.[7]

[4] The words "pool" and "association" are used interchangeably in many places in this article.

[5] The word "output" is used to cover not merely the product of a factory but also amount of sales and deliveries.

[6] It should be borne in mind that the discussion of combinations in this article is based upon information which the writer has been able to secure. It is not unlikely that information in the possession of others might upset the assignments made under the various classes or types.

[7] Testimony of Mr. Waterbury, *Report of the Industrial Commission*, vol. xiii,

A percentage arrangement slightly different from the cordage agreement is shown in the Steel Rail Pool of 1887. Here it was agreed that 800,000 tons of rails should be allotted at once according to certain agreed percentages. An additional allotment of 250,000 tons was made to the board of control to be reapportioned for the adjustment of differences as deemed equitable. Subsequent allotments were to be divided according to the same ratio. The board of control was required to make these further allotments in order at all times to keep the unsold allotments at least 200,000 tons in excess of the total current sales, as shown by monthly reports. Furthermore, the board was also required to increase the allotments upon the written consent of 75 per cent of the percentages. Three times a year the board had the power to cancel allotments which a party had been unable to make "in due time." These they could reallot.[8] The agreement itself provides no penalty for exceeding the assigned allotments, but Belcher is authority for the statement that there was such a penalty which he gives as being from $1.50 to $2.50 per ton.[9]

It is extremely interesting to note the remarkable faithfulness with which the salient features of the cordage association are reproduced in a very recent pool, the Atlantic Passenger Conference of 1908. The conference consisted of a westbound and eastbound agreement on steerage traffic. In the western agreement, that is, affecting traffic to the United States, eight companies participated, dividing traffic as follows:

	Per cent
Allan Line	.62
Anchor Line	3.40
Cunard Line	13.75
Hamburg-American Line	19.61
Holland-American Line	6.63
North German Lloyd	26.53
Société de Navigation Belge Americaine	9.71
International Mercantile Marine	19.75

p. 126. *Cf.* also S. J. McLean, "Pools, Trusts, and Industrial Combinations in the United States," *Quarterly Review* (London), vol. 199, p. 185.

[8] Memorandum of Agreement, *Report of the Commissioner of Corporations on the Steel Industry,* part I, pp. 69-71.

[9] W. E. Belcher, "Industrial Pooling Agreements," *Quarterly Journal of Economics,* vol. XIX (November, 1904), p. 117. Belcher also states that the concerns in this pool entered into informal price agreements. As these are not contemplated in the original pooling agreement the organization has been classed as *simplex* rather than under one of the mixed groups.

Eastbound, that is, to Europe, the Canadian Pacific Lines became a party to the conference and some rearrangement of the percentages was made. In 1909 the Russian-American Line after a competitive struggle became a member. The percentage allowed to this line is unknown.

The conference agreement provided for a compensatory tax of £4 a head for exceeding the allotted percentage. This was paid to those falling below in theirs. Each line was required to furnish four times a month statistics of all steerage and second cabin passengers. Upon the basis of these figures the secretary supplied the lines with weekly statistical statements of the passengers carried, and with monthly statements showing the relative position of the lines.[10] The conference required each line to furnish a guarantee fund of £1000 for each one per cent of allotment allowed it. "Undue withdrawal" from the conference or "action rendering the continuance of the contract impossible" was penalized by the forfeiture of the entire amount of this deposit. For a wilfully incorrect statement of statistics a line was to be assessed not less than £2500.

While the agreement contained certain provisions in regard to rates, the organization cannot be regarded as susceptible of a mixed classification. The rate provisions were solely in the interest of obtaining an adjustment of traffic that would conform to the schedule of percentages. Being either above or below its percentage, a line was entitled to adopt measures to secure a correct adjustment—presumably by a change of rates. Seventy-five per cent of the lines involved might direct the raising or reduction of rates, but no line might be compelled to fix its gross rate per adult passenger at less than £5, or more than £8, thus leaving a wide margin at the discretion of the line in question.[11]

II. Output curtailment.

The pool curtailing output, either in the simple or in the mixed form, does not seem to have been common. Its simple form is shown in the Kentucky Distillers Agreement of 1887. This combination

[10] All passengers forwarded in any intermediate class between steerage and cabin were to be considered as steerage passengers. Even cabin passengers were regarded as steeragers, unless paying at least the "lowest cabin fare" as defined in another article of the agreement.

[11] Agreement AA, *U. S.* v. *Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft.* Petition, U. S. C. C. for the Southern District of New York, pp. 40-64.

had its origin in the depressed condition of the trade which had been practically continuous since a period of great overproduction in the earlier eighties. Millions of gallons of whiskey had been exported at that time. Unable, however, to find a European market many distillers were forced to bring the whiskey back in an attempt to secure ultimately a market for it here. This whiskey returning added to the depressed condition of the trade and resulted in the agreement of 1887.[12]

Although expressly stating the right of every signatory to make as much whiskey as he chose, this document provided that it was "for the pecuniary advantage of each" to make only the amount set opposite his name, and further imposed a penalty of twenty cents per proof gallon upon all whiskey made by any signatory in excess of the stipulated amount. Such money was then to be distributed among those confining themselves to the production allotted to them.[13] On its face, the agreement thus appears to be for division of output, but such was not in reality the case. The significance of the agreement can be appreciated only when it is known that the amount set opposite the names of the various signatories (which does not appear in the text of this original agreement) was 100 gallons each, an amount so small that no distillery could afford to begin operations.[14] It is thus seen that in reality the pool was purely for curtailing output, and did not in any sense contemplate a division of output.

III. Territorial division.

The United Refining Company, organized in the late eighties, dealt in an article which is the product of coal tar, a residuum of the gas works, and which is produced whether there is a demand for it or not. When a large surplus above demand occurred in any one section of the country the whole tendency was to "dump" that surplus upon a market in another section where there was only a moderate amount available. This tended to distribute among all of the manufacturers the loss occurring through surplusage, instead of throwing it upon the party in whose territory it took place. Such a state of affairs led to a territorial agreement. Each party to the compact bound itself to confine its

[12] Testimony of Mr. Atherton, *Report of the Committee of Manufacturers with Reference to Trusts,* H. Rept. 4165, 50 Cong., 2 Sess. (1888-1889), p. 5.

[13] Articles of Agreement, H. Rept. No. 4165, *op. cit.,* p. 29.

[14] Testimony of Mr. Atherton, *ibid.,* p. 7.

trade and sales to a definite territory and not to send the surplus above such trade and sales elsewhere unless it were required. In event of a large surplusage and no other concern requiring the product, the manufacturer was to destroy it by changing it into pitch, which was accomplished through distillation. The pitch was used as fuel and was also shipped abroad. The manufacturer retained for himself the oils thus secured.[15]

General familiarity with the international agreement of the Tobacco combination makes extended treatment unnecessary. In the nineties the American Tobacco Company established a depot in London, England. In 1901 negotiations with a view to purchase were opened with Ogden's (Limited), one of the largest of the tobacco concerns in Great Britain. Before the end of that year substantially all of its outstanding stock had been acquired. The fighting qualities of the American Tobacco interests were well known, and, alarmed at this acquisition, thirteen of the largest English companies united to form the Imperial Tobacco Company. The latter at once opened a campaign to check the invasion and, as a part of its program, threatened to invade the territory upon our side of the Atlantic. As a result an agreement was effected between the Imperial Company and the American interests. In terms this provided that the Imperial Company was not to do business in the United States nor the American companies in the United Kingdom.[16] Another contract, part of the same agreement, provided that the British-American Tobacco Co., Ltd.—a concern to be organized under the companies' acts—should take care of the "export business." By this was meant the manufacture and dealing in tobacco in either England or the United States for export to any country except the other, and also the manufacture and dealing in tobacco and its products in any country or place outside of the United States and England.[17]

IV. Joint sales.

Historically the joint-sales pool is nearly as old as the output-division pool. In the former type of organization the various

[15] *Report of the Senate Committee on General Laws on Investigation Relative to Trusts*, N. Y. Sen. Doc. No. 50, 1888, pp. 624-625.

[16] There were certain minor exceptions to this rule of slight importance. *Report of the Commissioner of Corporations on the Tobacco Industry*, Exhibit No. 1, part I, pp. 431 ff.

[17] *Ibid.*, Exhibit No. 2, pp. 440 ff.

manufacturers agree to employ a common sales agent through which agent the products of the combination are marketed. The first organization of this type was formed in the sixties in the salt industry. As early as 1866 many of the salt manufacturers of Michigan were uniting their interests in the sale of the product. In 1868 the Saginaw and Bay Salt Company adopted articles of association, and during the first year of its existence handled four fifths of all the salt shipped from the Saginaw Valley. In 1871 the association broke down, but a new one was formed in 1876 known as the Michigan Salt Association, which, with some changes of name, continued for many years. The Michigan Salt Association was originally incorporated for five years. It had a capital stock of $200,000 divided into twenty-five-dollar shares of which only two dollars was paid up. It was managed by a board of nineteen directors. Every manufacturer upon becoming a member executed and delivered to the association either a contract for all salt manufactured by him or them or else a lease of salt manufacturing property. This contract did not impose any restriction that would prevent the manufacture of salt at any and all times, though providing that in case the manufacturer sold salt upon private account he should pay the association ten cents for every barrel sold. An annual dividend of seven per cent was paid upon the amount of stock actually paid in before the proceeds of the sales were divided.[18]

It is probably evident to the reader that the joint-sales pool must by virtue of the function of joint selling bear a definite relation to price. The act of selling implies the fixing of a price, but the methods of price determination in pools of this type are significant. Where the selling agent has full control of the marketing of the product, as appears to have been the case with the Michigan Salt Association, the parties to the combination have no real voice in the matter of prices. The price of the goods sold is something that arises incidentally, as it were, to the act of selling. In such a case, therefore, one is justified in using the simple form of classification.

An entirely different situation appears, however, when the members of the combination employing the joint-sales agent determine the prices at which their agent shall sell. In such a case

[18] J. W. Jenks, "The Michigan Salt Association," *Political Science Quarterly*, vol. III (1888), pp. 78-98.

the determination of the price is not, as in the former instance, a function incidental to selling, but a matter for the decision of the members of the combination who are entirely outside the sales organization proper. It therefore appears correct to designate such an arrangement as a mixed form in contrast to the simple form mentioned above.[19]

V. Price.

The price pool scarcely calls for definition since the majority of people are more familiar with this manifestation of combination than with any other. It is simply an organization for the purpose of fixing and controlling prices. Its earliest appearance, at least in the simple form, seems to have been in the Gunpowder Trade Association of the United States, an organization perfected April 29, 1872, in New York city. The purpose of the combination was to fix and establish prices upon powder throughout the United States. Each of the seven parties to the agreement was entitled to a certain number of votes. Three concerns were allotted ten votes each, three others four votes each, and the last, six votes. The association was to meet four times a year for the purpose of establishing prices. A "council" of five persons was to meet weekly to adjudicate upon discrepancies in, and deviations from, prices.[20]

The Nashville Coal Exchange was an organization composed of various coal-mining companies operating in Kentucky and Tennessee and of persons and firms dealing in coal in Nashville. Among its purposes, as stated in the articles of the exchange, is the following: "To do all in its power to advance the interests of the coal business at Nashville . . . *and to establish prices on coal*[21] . . . and to change same from time to time as occasion may require." Coal classed as No. 1 was given a minimum price of 4½ cents per bushel at the mines; freight of 4 cents and dealer's margin of 4½ cents were added to this minimum, making the price of coal 13 cents per bushel. The same arrangement, with certain variations in the charge for the different items, was used for the other classes of coal. When these fixed

[19] *Infra,* Blue Stone Association and Paving Brick Combination.

[20] *U. S.* v. *E. I. du Pont de Nemours and Co.* In Equity No. 280, Government Exhibit No. 96-b, U. S. C. C. of the District of Delaware, Petitioner's Record, Exhibits, vol. I, pp. 476-479.

[21] Italics are the writer's.

prices and margins were raised in excess of freight advances, such increase was divided equally between dealers and mine owners. Fines were imposed for violations of the prices established by the exchange; and to secure further enforcement of rules, owners of mines were not to ship to dealers in Nashville not members of the Coal Exchange, and dealers were forbidden to buy coal of owners who were not members.[22]

Easily the most interesting pool of the many that have utilized some sort of price-fixing arrangement is the recently dissolved Bathtub trust. This organization was formed in the latter part of 1909 or early in 1910. Its basis was an agreement whereby the manufacturers of sanitary enameled ironware agreed to pay a royalty of $5 per day upon each furnace operated by them, to a certain Edwin L. Wayman, known as the licensor. To Wayman had been assigned certain patents formerly controlled by the Standard Sanitary, Wolff, and Mott companies, upon a tool commonly used to sprinkle enameling powder upon the red-hot iron tubs and other ware in the process of manufacture. It is significant that this process could also be performed by hand though more conveniently accomplished by the use of the tool in question. Wayman in return for the above furnace royalty agreed to license the manufacturers, under the letters patent transferred to him, to use the tool. Other clauses of the agreement provided that the selling prices to jobbers should be established through the licensor (Wayman) by a price committee appointed by the various manufacturers; also for the allowance, by the licensor on sales to jobbers by some of the smaller concerns, of certain preferential discounts of from 2½ to 5 per cent.

Maintenance of the price schedules of the association was enforced through the furnace clause of the agreement. If the terms of the license were complied with, 80 per cent of the furnace royalties were returned to the concerns by a system of deferred rebates. A violation of any part of the agreement empowered the licensor to withhold all rebates and declare them forfeited.[23] Another interesting feature of the pool was a jobber's license

[22] 43 Fed. 898 ff. and 46 Fed. 432 ff.

[23] Memorandum of Agreement and License Agreement, *U. S.* v. *Standard Sanitary Manufacturing Co. et al.*, U. S. C. C. for the District of Maryland, Record, vol. II, pp. 4-6 and 20-26.

agreement, practically a factor's agreement, providing a scale of discounts and terms and, in addition, a schedule of rebates, *if the jobber complied with all the conditions of the agreement.* A quantity rebate was also provided for. The purchaser agreed to maintain the established selling price and also not to purchase, advertise, sell or solicit orders for any manufacturer not duly licensed by Wayman.[24]

Upon its face the combination is clearly one to raise prices. The patent feature was employed apparently with the idea that it would make the combination legal or at least strengthen it. This is to some extent borne out by the fact that the combination relied upon *Henry* v. *Dick* in its appeal to the Supreme Court. That body held that the combination by reason of the restrictions mentioned above clearly contravened the Sherman act and that the added element of the patent could not confer immunity.[25]

VI. Clearing house.

The significant feature of the joint-sales pool is the employment of a sales agent to market the product. In the case of the clearing-house pool, on the contrary, each party to the combination retains control of the marketing of its own product, while the central organization is used simply as a clearing house for the division of the profits realized. As will appear later, the clearing house may be an incorporated company or a purely voluntary association.[26]

The only clearing-house pool not belonging to one of the mixed forms appears to be the turpentine combination employing an incorporated company for the purpose of clearing. Some question may be raised as to the justice of the classification. The reason for it is to be found in the fact that the agreement contains certain arrangements as to rosin shipments on private account as between Anonyme on the one hand and Patterson and Shotter on the other.[27] Inasmuch as these arrangements

[24] Jobber's License Agreement, *ibid.*, pp. 32-39.

[25] Decree of November 18, 1912, *Standard Sanitary Manufacturing Co. et al.* v. *United States of America;* on appeal, p. 11.

[26] *Infra,* Asiatic and Brazilian Steamship combinations.

[27] Among other things it was provided that Patterson and Shotter should not sell rosin for shipment to Belgium nor Anonyme for London or Hamburg, except for the account of the former parties. This arrangement has no bearing

are for rosin, while the pool was concerned only with turpentine, it scarcely seems just to give the pool any but a simple classification. The Globe Naval Stores Company was chartered under the laws of West Virginia, February 15, 1905, for the purpose of dealing in turpentine. Thirty-four per cent (340 shares) of its stock was held by the Patterson-Downing Co.; twenty-one and one half per cent (215 shares) by the S. P. Shotter Co.; twenty-six and one half per cent (265 shares) by the Société Anonyme des Produits Résineux; and eighteen per cent (180 shares) by Nickoll and Knight. These four concerns, in consideration of the premises and one dollar paid to each, sold to the Globe their respective turpentine businesses. They were, none the less, to continue the buying and selling of turpentine, conducting their business as in the past under their own names, but for the account of Globe. Patterson, Shotter and Anonyme were to receive a commission as agents upon sales made by them.

The operations of all the parties to the pool for the account of Globe were to be conducted and entered under a turpentine account. This was charged at cost with all the turpentine bought for Globe and credited with all sales made for its account. A settlement of profit and loss account between Globe and each of the four parties to the agreement was to take place every six months.[28]

VII. Legitimate trader.

For several years past there has been noticeable an increasing tendency toward the elimination of the middleman in American business life. More and more, people are endeavoring to supply their wants directly. As this tendency develops, the retailer first finds his means of livelihood menaced and the jobber and wholesaler are also able to read the handwriting on the wall. It is out of this situation that what I term the "legitimate trader" association[29] has developed. This type of organization is of interest largely because of the striking contrast between its aims and

whatsoever upon the terms and conditions of the agreement as relating to clearing sales of turpentine and may not improperly be regarded as a separate agreement for division of territory on exports of rosin.

[28] Memorandum of Agreement, *U. S.* v. *American Naval Stores Co. et al.*, Petition in Equity, U. S. D. C. for the Eastern Division of the Southern District of Georgia, Exhibit A., pp. 25 ff.

[29] This is not to say that all wholesale and retail associations are legitimate trader associations,

methods of operation and those of the ordinary manufacturers' pool. The legitimate trader association has in view one object,—the confining of the trade to its (in their view) legitimate channels. But this will be found to resolve itself into three separate parts:

(1) To prevent shipments from the manufacturer direct to the consumer;

(2) To confine the shipments of manufacturers to wholesalers and of wholesalers to retailers;

(3) To confine the trade of the retailer to his legitimate territory.

To accomplish these ends several methods have been resorted to, among which classification has been prominent. Many of the large wholesale and retail trades of the country possess so-called credit agencies usually run by or in conjunction with national associations or by associations composed of the dealers in a state or group of states. These organizations publish books recognized as establishing the credit rating, business standing, and classification of dealers.[30] In certain cases these rating books have designated by arbitrary definition or rules who are manufacturers, who are wholesalers, and who are retailers. Whenever one whom the retailers regarded as a consumer has been listed as a retailer, the retail association of that district has insisted that his name be stricken from the list and he be properly classified as a consumer. Shipments direct to such consumers were strictly banned by the retail associations. Complaints were made by the members of the latter whenever any wholesaler, manufacturer, dealer, or agent shipped to a person not regarded, according to the classification, as a legitimate retail dealer. In case of such complaint the matter was usually taken up with the manufacturers' or wholesalers' association if the offending party was a member of one. If not, the secretary of the retail association could take up directly the shipment in question,[31] exerting delicate pressure

[30] Thus the *Blue Book* of the lumber trade is published by a corporation called the National Lumber Credit Manufacturers' Corporation, the stock of which is either owned or controlled by an association composed of fifteen or more of the largest manufacturers' associations in the United States. The *Green Book* of the Southern Wholesale Grocers' Association was published by that association and the *Blue Book* of the plumbing trade was issued by the National Committee of the Confederated Supply Associations.

[31] Constitution of Michigan Retail Lumber Dealers Association; *U. S.* v. *Hartwick,* Petition, U. S. C. C. for the Eastern District of Michigan, Southern Division, pp. 45-48.

through the fact that the retailers, members of the said association, might refuse the offending manufacturer or wholesaler any further orders. In the same or analogous ways the wholesalers' associations may endeavor to prevent the shipment from producers and manufacturers to others than the members of the wholesale association.[32]

In certain cases the names of individuals and concerns making these so-called "unethical" shipments have been published in the trade journals thereby operating as a boycott.[33] In other instances lists of such individuals and lists of legitimate dealers have been sent through the mails by committees on classification or by secretaries of retail associations.[34] In 1902 in the lumber trade the Lumber Secretaries' Bureau of Information was incorporated. It was a continuation of an earlier unincorporated association and its purpose was to advance the interest of the retail dealers who were members of the lumber retailers' associations. Composed originally of the secretaries of some five or six retail associations it came to include many more. Correspondence between the secretary members furthered the ends discussed above and the bureau served as an efficient agent for the dissemination of information in regard to unethical shipments.[35]

Frequently the closest kind of coöperation has existed between the wholesale and retail associations in the same trade. It has in at least one instance extended to joint classification by the wholesale and retail associations. The question of who are retailers is always an important one, and the interests of the wholesaler are to a certain extent opposed to those of the retailer. This arises through the fact that the former is looking, in the interest of his sales, to as wide a definition of the term as possible, while the retailer insists upon strictly excluding many large buyers such as mail-order houses and coöperative organizations from the

[32] Decree of Injunction, *U. S.* v. *Southern Wholesale Grocers' Association et al.,* U. S. C. C. for the Northern District of Alabama, p. 4; and *U. S.* v. *Pacific Coast Plumbing Supply Association,* Petition, U. S. C. C. for the Southern District of California, pp. 12-14.

[33] *U. S.* v. *Hollis,* Petition, U. S. C. C. for the District of Minnesota, p. 57.

[34] Exhibits O-U, *U. S.* v. *Eastern States Retail Lumber Dealers' Association,* Petition U. S. C. C. for the Southern District of New York, pp. 92-100; and Exhibit A, *op. cit., U. S.* v. *Hollis,* pp. 69 ff.

[35] *Op. cit., U. S.* v. *Hollis,* p. 41.

classification of retailers.[36] Finally, in some cases trade conventions and assemblies have adopted articles, resolutions, and agreements looking to better classification and to controlling the trade in the channels outlined above.[37]

In the Tile, Mantel and Grate Association of California similar objects were apparently held in mind, though the method of attainment was somewhat different. The Tile, Mantel and Grate Association was an unincorporated organization formed in 1898, composed of dealers (not manufacturers) in tiles, mantels, and grates in San Francisco or within a radius of two hundred miles, and having an established business carrying not less than $3000 worth of stock. This appears to be classification by an arbitrary definition of what constitutes a dealer. All manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association by the payment of an entrance fee and the signing of the constitution and by-laws. The true significance of the organization appears in sections 7 and 8. No member was allowed to purchase of a manufacturer not a member, nor to sell to non-members at less than the full list price which was about fifty per cent higher than the price when sold to a member. Furthermore a manufacturer selling to any one outside of the association forfeited his membership.[38] In other words, a manufacturer by selling to other dealers than those carrying $3000 of stock automatically lost the trade of the member dealers of the association. The operation of the combination was such, therefore, as to confine the dealing in tiles, mantels, and grates to those defined above as dealers.

Duplex Pools

Output division and price.

The Soft Steel Pool of 1896, the Structural Steel Association of 1897 and the Steel Plate Association of 1900 all divided output upon a percentage basis. The Soft Steel Pool provided a

[36] *Op. cit., U. S.* v. *Eastern States Retail Lumber Dealers' Association,* pp. 37 ff.

[37] *Ibid.,* Boston, Baltimore and Pittsburgh lumber and trade agreements, Exhibits F, H, and I, pp. 80-87. It should be noted that an injunction was recently handed down against the Eastern States Retail Lumber Dealers' Association and other associations, parties to the same suit.

[38] 98 Fed. 817; 106 Fed. 38; 115 Fed. 27; 193 U. S. 38. Though this agreement seems to have affected prices the clauses of it available say nothing of prices. Hence the simplex classification has been used.

scale of minimum prices for different trade centers, varying from $20.25 to $22.50 per ton. Originally this organization considered a monthly fixing of tonnage, but this feature was finally dropped. Excess above the percentage allotment was penalized by a tax of two dollars per ton, the sums thus received being distributed among the works that had failed to ship their allotment.[39]

Both the Structural Steel and the Steel Plate agreements provide for the maintenance of the pool prices as established in separate schedules. Both organizations likewise required the rendering of monthly statements to a commissioner who made up the accounts, charging those who had exceeded their percentage allotment and crediting those who had failed to sell theirs. Members of the Structural Steel Association were required to deposit $2500 each and $500 a month thereafter until the sum of $45,000 had been received, this fund to serve as a guarantee for the performance of the obligations of the agreement. The penalty set for exceeding the percentage allotment was half a cent per pound. The guarantee fund of the Steel Plate Association was made up by a deposit of $1000 for each one per cent of the output allotted. Those exceeding the established percentage were fined .35 of a cent per pound.[40]

The Explosives Agreement of 1886 presents a peculiar arrangement in the method of dividing output. The twelve parties to this agreement were divided into two groups, one of three companies and one of nine companies. Of the aggregate trade of the parties[41] each one of the "Nine Companies" group received an arbitrary allotment of so many kegs of blasting powder or so many kegs of sporting powder or so many kegs of each. When the yearly trade of the "Three Companies" increased beyond the average for the years of 1882, 1883, and 1884, the arbitrary allotment made to each of the "Nine Companies" was increased by a corresponding percentage. If the "Nine Companies," however, sold more than their arbitrary allotments they were penalized by being compelled to take as a unit from the "Three Companies"

[39] *Iron Age,* vol. I (1896), p. 875.

[40] Exhibits A and B, *U. S.* v. *U. S. Steel Corporation,* U. S. C. C. for the District of New Jersey, pp. 70-82.

[41] Except the anthracite regions of Pennsylvania and in cases of government and export sales. The exception of the anthracite regions in which the "Nine Companies" were not to trade, while a territorial arrangement, scarcely justifies a *triplex* classification of this agreement instead of the *duplex* one used.

sufficient powder to adjust the liability. It thus appears that while the "Nine Companies" were penalized for exceeding their allotments, the "Three Companies" were entirely free from any fine and might sell to any extent they chose. Another clause of the agreement provided that separate agreements should be executed by the parties to the combination relative to the prices to be maintained for sales of powder. Arrangements were also made for a board of arbitration to adjust disputes.[42]

The "Fundamental Agreement" of the explosives trade that three years later followed the agreement of 1886 is similar in character. This time, however, all companies (the "Three Companies" being regarded collectively) were alloted arbitrary quotas of powder. This was done in the case of the "Three Companies" by converting the average for the years 1882, 1883, and 1884 into arithmetic terms. Though thus setting arbitrary quotas in all cases, the pool was really upon a percentage basis, for the agreement provided that commutations in money values should be made for "sales in excess or in deficiency of the *proportions*[43] to which each party should be entitled in the division of trade." This destroyed the unlimited right of sale without penalty enjoyed by the "Three Companies" under the prior agreement.

The agreement was unlike its predecessor in dividing the country (excepting certain portions) into seven zones,[44] in each of which uniform prices were to prevail. As in the former case a board for the arbitration of disputes was provided for and prices were established in supplementary agreements.[45]

Price and clearing house.

An interesting case of pooling under the duplex form is to be found in the Table and Stair Oilcloth Association. This combination was organized in June, 1886, for the purpose of obtaining a fair price for the product and also in order to prevent its utilization as a "leader" in the dry-goods trade. The basis

[42] Agreement, Government Exhibit No. 7, *U. S.* v. *E. I. du Pont de Nemours and Co.*, U. S. C. C. for the District of Delaware, Petitioner's Record, Exhibits, vol. I, pp. 110-121.

[43] Italics are the writer's.

[44] It should be noted that the scope of this agreement territorially was the same as that of the 1886 agreement.

[45] Agreement, Government Exhibit No. 6, *op. cit.*, *U. S.* v. *E. I. du Pont de Nemours and Co.* Petitioner's Record, Exhibits, vol. I, pp. 94-109.

of the pool was several separate contracts, one being made by the association with each individual manufacturer. The form of each contract was such as practically to constitute each manufacturer a factor of the association. Each agreed, for example, not merely to maintain the prices fixed but also not to sell at less than the full list price to purchasers who did not maintain prices; not to offer anything outside of the intrinsic value of the goods for the purpose of obtaining an order or effecting sales; not to sell except upon certain credit terms; not to pay freight except in certain specified cases; not to pay agents more than certain commissions, etc. The agreement provided for certain rebate allowances which might be made by the manufacturer members of the association to those purchasers who maintained prices, etc.

The arrangement in regard to clearing provided that each manufacturer was to pay into the pool twenty-five cents per piece for all goods sold, the word piece being arbitrarily defined as meaning so many yards of shelf oilcloth or so many yards of stair oilcloth. Exactly how these sums of money were divided does not clearly appear, but as certificates of beneficial interest were issued and sold by the association to the various manufacturers, it is not unlikely that these were utilized for the purposes of division. Failure to comply with all the terms of the contract subjected the concern or individual to heavy penalties. These were drawn from a fund created by the deposit of cash or convertible securities of a satisfactory character. The affairs of the association were in the hands of a commissioner.[46]

In its principal aspects the Envelope combination was similar to the Table and Stair Oilcloth Association except that the former used a corporation for pooling purposes instead of a voluntary association. The Standard Envelope Co. was a Massachusetts corporation with a capital of $5100 organized by certain envelope manufacturers in that state and Connecticut. There were nine parties directly interested in it besides four or five other concerns more or less intimately connected.

In 1887 the nine parties mentioned entered into an agreement with the corporation. Each bound his concern to surrender to that company each month a sworn statement of the number of

[46] Contract, *Report of the Committee on General Laws on the Investigation Relative to Trusts*, N. Y. Sen. Doc. No. 50, (1888), pp. 609-617; and the testimony of the commissioner of the pool, *ibid.*, pp. 601-608.

envelopes sold and delivered during the preceding month. Upon the returns thus made each member of the pool agreed to pay to the Standard Envelope Co. a tax of fifteen cents per thousand[47] except on such as were sold to other members of the pool.[48] Another agreement supplementary to this provided an arrangement for equalizing and keeping prices at a fixed rate and also for equalizing losses and expenses which might be incurred in so doing.[49] Failure to adhere was penalized. It is not known exactly how the payments made were cleared, but testimony shows that the manufacturers did not always take out the same amounts as they paid in.[50]

The most peculiar of the pools using a clearing-house feature is without doubt the Addyston Pipe Company.[51] In fact, this pool may almost be regarded as in a class by itself since its clearing arrangement and its auction feature in no way resemble the characteristics of any other pool. The organization was first formed on December 28, 1894, but the system adopted of having in the several states a fixed basis upon pipe lettings did not prove satisfactory, and was discarded in the following May. By a new system, all competition upon pipe lettings was to take place among the shops prior to the said letting. The six shops in the combination were to have a representative board located in some central city to which all inquiries for pipe were to be referred. The board fixed the price at which the pipe was to be sold. Bids were then taken from the different shops for the privilege of handling the order. The party who at this auction agreed to give the highest bonus for division among the others secured the contract.[52]

The principal points of difference between the two pools next to be considered and the Oilcloth and Envelope combinations are in the form of the agreements. The St. Louis Granite Company was a corporation organized in 1891 by representatives of five concerns controlling all but a small percentage of the crushed granite sold in that city. The capital stock of the company was

[47] This tax varied from time to time and there is nothing to show whether it represented the amount realized above costs of production or not.

[48] *Op. cit., New York Senate Trust Investigation of 1888,* pp. 468 ff.

[49] Testimony of J. Q. Preble, *ibid.,* p. 335.

[50] *Ibid.,* pp. 335.

[51] The operation of this combination is so well known that the treatment has been made as brief as possible.

[52] 85 Fed. 271. *Cf.* especially 273 ff.

$2,000, divided into five shares, one of which was taken by each of the five representatives who had incorporated it. Each incorporator endorsed upon his share the statement that it was held in trust for the concern of which he was a member.

Each of the five concerns executed a contract with the Granite Company, by the terms of which it agreed to sell and deliver to that organization, for a period of five years, at certain specified prices, its entire crushed granite output. In return, the St. Louis Crushed Granite Company agreed in each contract to pay cash for the granite and to order from time to time, of the entire quantities of granite which it needed, an amount equal to the numerical proportion which each particular contract bore to the whole number of like contracts. Apparently, therefore, we have joint-sales and output division. How far this was from being the actual case is shown by the report of the referee in the suit arising out of these contracts. In regard to the quota provision mentioned above, it was not shown that the Granite Company ever made such a call. Furthermore, the five concerns sold exactly as they had prior to the company's formation, except that it was understood that sales were to be made in the name of the company. The company received the reports of sales, entered them in its books and collected the money accruing therefrom. It also *fixed prices*. These things, the referee found, constituted the only business that the company was supposed to transact. The dividends which were declared were received by the incorporators. Hence, though apparently organized for joint selling and dividing output, the organization in reality served as a clearing house and to fix prices.[53]

The Continental Wall Paper Company is another organization in which the text of the agreements is misleading. The basis of the combination was several separate contracts, each entered into by one of the manufacturers of wall paper (known as the vendor) with the Continental Wall Paper Company, a corporation of the state of New York with an authorized capital of $200,000 divided into 16,000 shares. It is probably unnecessary to state that the Continental was organized by certain large manufacturers of wall paper. By the terms of the contract each vendor manufacturer agreed to purchase a certain number of the 16,000 shares of the said stock. Although the agreement itself does not reveal the fact, it appears from the opinion of the court that each manu-

[53] 86 S. W. 213.

facturer bought these "in proportion to the product of the year before the combine took effect." The stock certificates thus acquired were endorsed in blank to the company to be held in trust to secure the performance of the agreement. On failure to perform, the stock could be sold, the proceeds being regarded as the liquidated damages of non-performance.

The vendor manufacturer further agreed to sell his entire output to the Continental Wall Paper Company at a certain fixed scale of prices and the company agreed to resell to jobbers the goods so acquired, also at fixed prices. Each jobber was required to sign a contract with the company for exclusive purchase and the maintenance of specified prices. In return jobbers were classified into first, second, and third-class jobbers, each group being allowed certain preferential discounts from list prices, the discount varying with the expensiveness of the product. To the purchasers not classified as jobbers, manufacturers might sell in their own names, but for the account of the company and at prices known as "road prices" which were the equivalent of the full list prices from which jobbers were allowed preferential discounts as described above. On such sales the manufacturer was allowed the same discounts as were given to second-class jobbers. The fixed prices at which the vendor manufacturers were supposed to sell to the Continental were the cost of production with a sufficient amount added to cover incidental expenses merely. The difference between these prices and those exacted from jobbers or others constituted the profits of the combination, which were distributed as dividends to the shareholders of the Continental Wall Paper Company. While apparently a joint-sales feature, such was not in reality the case, despite the wording of the contracts. This was because, as Mr. Justice Harlan put it: "In reality, the agreement was, and so the business was carried on, that the manufacturers should maintain sample rooms and selling agents, and should solicit and receive orders from all wholesalers, whether jobbers or so-called 'Road' or 'Quantity Buyers'; *that the entire business should be done by so-called vendors,* but payments should be made by jobbers to the so-called company, and by wholesalers, other than jobbers, directly to so-called vendors."[54]

Joint-sales and output division.

The Chesapeake and Ohio Fuel Company was employed as

[54] 212 U. S. 243; 148 Fed. 939 ff. Italics are the writer's.

joint-sales agent by the Chesapeake and Ohio Coal Association in the latter part of 1897. The Coal Association was composed of several concerns, all of them miners and shippers of coal, and part of them makers and shippers of coke upon the line of the Chesapeake and Ohio Railway in West Virginia. The agent agreed and covenanted to sell for western shipment by rail and to pay the Coal Association for not less than 600,000 tons of coal per annum and 75,000 tons of coke.[55] Not later than the twentieth day of each month the executive committee of the Coal Association designated the percentage of total product of each grade of coal and coke which they thought might best be shipped by each member during the succeeding month. This apportionment was turned over to the joint-sales agent—the Fuel Company—which distributed the orders received according to the apportionment. The agent also made and rendered to the Coal Association daily reports of sales and the net prices thereof, also a monthly report showing tonnage weighed and shipped or weighed only, together with average price. The average price is not to be clearly understood until it appears that the executive committee of the Coal Association fixed from time to time the minimum price of coal. Below this price the sales agent was not to sell. As commission on the sales effected, the Fuel Company received ten cents per ton. This sum was known as gross profit and the average price above referred to was computed upon the basis of the actual price less the gross profit and minimum price as established. According to this average price the joint-sales agent paid the members of the Coal Association for the coal and coke sold.

In spite of this arrangement the Coal Association cannot fairly be regarded as a price pool. The minimum prices were fixed, it is true, but a clause in the agreement expressly provided that the Fuel Company should at all times endeavor to secure the maximum price for coal and coke. In the judgment of the writer, therefore, the minimum price clause cannot properly be regarded as subjecting this pool to triplex classification.[56]

The Pocahontas Coke Company resembles very closely the Chesapeake and Ohio Fuel Company. The former was organized by some twenty coke-producing and manufacturing corporations in the Pocahontas Flat Top Coal Fields of West Virginia, in

[55] With sundry exceptions under certain conditions.

[56] 105 Fed. 93 ff. and 115 Fed. 610 ff.

accordance with a general agreement entered into on the 29th of June, 1905. Among other objects, the company was "to regulate, improve and standardize the quality of coke manufactured."

The method by which these ends were accomplished was as follows: Each manufacturer executed a contract with the company constituting the latter its sole sales agent and agreeing to pay to it a commission of five cents per ton on all sales of coke. The Coke Company, on its part, guaranteed each manufacturer payment for his coke at the average price for all coke passing the weighing scales each month. Each manufacturer was entitled to subscribe for one ten-dollar share of the $150,000 of capital stock of the Coke Company for each coke oven owned. The stock, however, was at all times to be held and retained by three trustees, elected by a majority of the parties. Apparently, this was merely to prevent a transfer of interest, as it was expressly provided that the voting power should remain in the hands of the stockholders.

The general agreement provided that the parties were to keep such ovens burning as would supply their respective proportions of the sales of coke made by the company. From a provision in the individual contracts signed by each manufacturer, it would appear that the basis of these proportions was that which the number of ovens owned by each manufacturer bore to the total number of ovens.

The Coke Company was to be managed by a general manager who was required not to be interested in any coke operations or plant and was to sell at the best possible market prices. After the payment of the operating expenses of the Coke Company, any surplus was to be distributed as dividends upon the stock, "each stockholder to have the same proportion of such surplus as the number of tons of coke furnished by him or it bears to the whole number of tons of coke furnished to said company for sale."[57]

Price and legitimate trader.

The Coal Dealers Association of California was organized in 1896 as an unincorporated association composed of the retail coal dealers in the city of San Francisco. In article 1 of the constitution appears the statement that: "It shall have for its object the furnishing of information to its members . . . and also the names of any dealers who have been guilty of violating

[57] 56 S.E. 264 ff.

any of the *rates*[58] or rules made from time to time." Besides this provision in regard to prices a "legitimate trader" feature is introduced into the combination by section 14 of the by-laws which was the text of an agreement executed by the Coal Dealers Association with the various wholesalers of the city and county of San Francisco. By this the wholesalers pledged themselves not to "sell coal at trade rates to any one not having an established yard" nor to sell "at less than card rates to consumers."[59] The enforcement of the card rules and rates of the retailers' association was practically left in the hands of the wholesalers.

> Upon receiving proof from the Coal Dealers' Association of the violation by any retail coal dealer of any of the rules of business printed on the rate card issued by said association and being satisfied that the charge is established, said wholesale coal dealers agree, and each of them agrees to, and will, charge the dealer so violating said rules or rule consumers' rates thereafter for coal, until said retailer dealer, if a member of said association, shall have been reinstated to membership in the Coal Dealers' Association of California by vote of the board of directors of said association, or, if not a member, until he shall have paid such reasonable penalty as may be imposed upon him by said association.

Following this clause is one prescribing the rates and rules to be enforced.[60]

Joint sales and price.

The Chicago Paving Brick combination, alleged to have existed from 1907-1910, used an individual as joint-sales agent instead of an association or incorporated company. This is in contrast to all the other combinations having the joint-sales feature which this article considers. There were three concerns in the combination for which the individual sales agent acted. From time to time the officers of the three companies met and agreed upon prices which were transmitted to the sales agent.[61]

Territorial and output division.

The available sections of the international agreement of the Aluminum Company of America indicate a combination for territorial and output division. Entered into sometime in 1908 the agreement provided that the European concern should not

[58] Italics are the writer's.

[59] The last with certain exceptions.

[60] 85 Fed. 252 ff.

[61] *U. S.* v. *D. V. Purington,* Indictment No. 4515, U. S. D. C. for the Northern District of Illinois, Eastern Division. Typewritten carbon of original, pp. 2-4.

sell in the American market (North and South America except the United States and including also West Indies, Hawaii, and the Philippines), the Northern Aluminum Company, the subsidiary of the Aluminum Company of America, reciprocating in the European market. Having laid down these territorial restrictions, the two parties then divided deliveries in the European market, 75 per cent to A. J. A. G. the European concern, and 25 per cent to the Northern Aluminum Company. In the American market the delivery percentages were reversed while each party was to have 50 per cent of the common market, presumably the rest of the world outside of American and European territory, except that sales in the United States were reserved to the Aluminum Company of America, as were certain foreign government sales to A. J. A. G.[62]

Joint-sales and output curtailment.

The General Paper Company shows the joint-sales pool in a most complex form. It was a corporation of the state of Wisconsin organized about May, 1900, with a capital stock of $100,000. The parties at interest were several large manufacturers of pulp and paper in the states of Wisconsin, Minnesota, and Michigan. It was alleged that the capital stock was divided into 1000 shares which were distributed among the members of the combination in proportion to output. By its articles of incorporation the General Paper Company was authorized to become sales agent for any and all kinds of paper and paper products and merchandise manufactured therefrom. The mills then proceeded to contract with the General Paper Company constituting it their joint-sales agent. Apparently it was not a price pool as the price of paper seems to have been fixed by the General Paper Company and not by the parties behind the joint-sales agent. The General Paper Company also had the power to control and restrict the output of the mills. A further provision is interesting, being somewhat of a territorial division nature, though not enough so to alter the classification. This was a clause giving to the General Paper Company the power to designate the publishers and other customers which each mill should supply.[63]

[62] *U. S.* v. *Aluminum Company of America,* Petition in Equity, U. S. D. C. for the Western District of Pennsylvania, pp. 15-16. It should be borne in mind that this treatment is based upon only a few sections of this agreement.

[63] *U. S.* v. *General Power Company,* Petition, U. S. C. C. for the District

Output curtailment and price.

The causes operating to bring into being the Western Export Association were similar to those that created the pool of the Kentucky Distillers—a large surplus of production.[64] A great export demand for alcohol about 1878 stimulated the building of distilleries. After 1882, however, there was a rapid decline in our export trade in alcohol. This was chiefly attributable to the fact that in that year the German government passed an act allowing German distillers a bonus or bounty amounting to about ten cents per gallon. This bounty enabled the distillers of that country to undersell us and practically drove us out of every European country. As a result, American distillers found themselves in the position of being able to produce about five times as much alcohol as the domestic market could absorb.[65] Out of this situation developed the Western Export Association. It was first organized in November, 1881, and it was re-formed at different times for different periods, generally to cover the winter months.[66] It continued until the formation of the Distillers and Cattle Feeders Trust in 1887. These pools used two methods of output curtailment. The first was the exportation of the surplus, which was done at a loss to the whole body, and at times ran as high as ten cents per barrel.[67] The second was the limitation of the distilleries to a certain percentage of full capacity.[68] From an article by Professor Jenks, it appears that at least some of these pools also fixed prices. Hence, the duplex classification has been given to this pool,[69] though the writer has no evidence that price fixing was always included in the program.

of Minnesota, Third Division, pp. 7-12. It is interesting to note that the General Paper Company is said to have entered into an agreement in 1902 with the Manufacturers' Paper Company, a corporation of New York which was alleged to be joint-sales agent for certain other manufacturers. The agreement claimed was territorial in character, the Manufacturers' Company agreeing not to compete with the General in Wisconsin or states west of the Mississippi.

[64] *Supra,* Kentucky Distillers Pool.

[65] Testimony of J. B. Greenhut, *House Committee on Manufacturers with Reference to Trusts,* H. Rept. No. 4165, 50 Cong., 2 Sess., 1888-1889, pp. 64-65.

[66] *Ibid.,* p. 83.

[67] Testimony of C. C. Clarke, *Report of the Industrial Commission,* vol. I. p. 169.

[68] *Ibid.,* p. 168.

[69] Jenks, J. W., "Development of the Whiskey Trust," *Political Science Quarterly,* vol. IV (1889), pp. 296-319; reprinted in Ripley, pp. 22-44.

Triplex Pools

Clearing house, territorial division, and price.

While the prime purpose of the Explosives International Agreement of 1897 was to secure territorial division, the fact that for a certain portion of the territory prices were fixed by joint arrangement of the parties at interest and the profits from these transactions pooled, brings the agreement under the mixed form of classification. The agreement developed out of circumstances substantially identical with those which produced the international tobacco agreement, except that in the present case the foreign manufacturers were the aggressors.

In terms the agreement provided that for the sale of high explosives[70] the world should be divided into four territories. The United States and its possessions, Mexico, Guatemala, Honduras, Nicaragua, Costa Rica, United States of Colombia and Venezuela were made exclusively "American territory." Other countries in South America other than those mentioned, British Honduras and the islands in the Caribbean Sea not Spanish possessions were denominated "syndicated territory." The Dominion of Canada and Spanish possessions in the Caribbean Sea were designated as a free market unaffected by the terms of the agreement. The remainder of the world was to be the exclusive territory of the European factories and was to be known as "European territory." Clearing and price fixing related solely to "syndicated territory." The American factories designated a chairman and a vice-chairman while the European factories did likewise. From time to time the chairmen were to mutually agree upon a *basis price* for each market in "syndicated territory" and likewise a *selling price.* The selling price was to be deemed a convention price below which no sales were to be effected. The difference between the base price and the selling price was syndicate profit to be divided equally between the American factories and the European factories.[71]

Joint sales, output division, and price.

The Blue Stone Association of 1887, though a joint-sales pool, differed from the Salt Association in several aspects, one of which

[70] It is important to bear in mind that the division of territory relates to high explosives and not to blasting and rifle powder.

[71] Agreement, Government Exhibit No. 119, *op. cit., U. S.* v. *E. I. du Pont de Nemours and Co.,* Petitioner's Record, Exhibits, vol. II, pp. 1123 ff. A digest of all these and other terms of the agreement will be found in the *Quarterly Journal of Economics,* vol. XXVI (1912), pp. 466-467.

was in the matter of fixing prices. As was pointed out in the discussion of the Michigan Salt Association, the fixing of prices which must naturally occur through the act of selling is not to be regarded properly as price fixing but as something incidental to the selling. In the Michigan Salt Association the price fixing incidental to the selling was outside of the control of the members of the association, who had arranged for that organization to handle their entire output or else had given it a lease of their plants. The Blue Stone Association employed a company known as the Union Blue Stone Company to market the product. This concern contracted as sales agent to make sales for the members of the association, so far as possible, of all the bluestone which the market would absorb for a period of six years from the date of the agreement. In contradistinction to the Salt Association, however, the Union Blue Stone Company was to sell only at prices fixed by the Blue Stone Association. Sales were to be apportioned between the members in certain fixed proportions of an aggregate of sales amounting to $1,905,000, a quota to be increased or diminished according to the amount of sales. Each member of the association was to furnish his quota of stone as thus apportioned upon the request of the sales agent.[72]

Clearing house, price, and output curtailment.

The Cotton Bagging combination of 1888 embraced eight concerns directly. L. Waterbury and Co., sales agent for the New York Bagging Co., was used as a clearing house for the pool. Waterbury and Co., of course, as agents for the New York Bagging Co. sold the output of that concern. Each of the other mills executed a contract with the Waterbury people which in terms purported to be an agreement to sell to the latter its entire output. The manufacturers were then to sell for the account of Waterbury and to pay over to that concern the proceeds of all sales after deducting a five per cent commission, interest, expenses, etc. According also to the terms of the contract, the prices of bagging were to be fixed by Waterbury from time to time. But an agreement made two days later between all of the eight parties provided that in the fixing of prices Waterbury should be governed by the votes of the majority of the parties

[72] 15 N. Y. App. Div. 602 and 164 N. Y. 401. It is fair to say that this pool might at least indirectly operate to curtail output, but this would appear to be dependent entirely upon how much the market could absorb.

of the second part—in other words all the concerns except the Waterbury-New York bagging interests. Other clauses of the second agreement fixed arbitrarily the proportion of interest of each of the eight parties, the Waterbury-New York bagging interests constituting one party, in the profits and losses of the "common enterprise." Finally, the agreement contained a clause requiring that the mills of the parties of the second part should be operated only to such an extent as might be decided upon by the majority of such parties.[73]

Clearing house, traffic division, and price.

The combination which, for want of a better name, has been called the Pennsylvania Coal Pool, was organized on February 15, 1866. It is, therefore, one of the oldest American combinations. In the first place, the five parties to the agreement divided the entire quantity of coal to be shipped between two regions; one region to ship seventy per cent of the total, the other thirty per cent. Two of the five companies operated in the seventy-per-cent region and three in the thirty-per-cent, and the contract next provided that the parties in each region should subdivide among themselves the percentages allowed their respective regions.

The business contemplated by the agreement was to be controlled by an executive committee of three members who were to appoint a general sales agent. Each party to the agreement was required, at its own expense, to deliver its proportion of the different kinds of coal in the different markets at such times and to such parties as the committee might direct through the sales manager or otherwise. A general average of the sales of all the parties was to be made in order that each party should receive the same average price per ton at the common point. From time to time the *committee was to adjust the price of coal* for the different markets. Under the control and direction of the committee, any one of the parties might act as agent in selling coal, but only to the extent of its respective proportion. All other sales, so the agreement reads, were to be regarded as made by the committee through the general sales agent. This indicates a joint-selling arrangement as to a portion of the sales, as does the clause referred to above in regard to deliveries. Inasmuch, however, as

[73] Appendices A and B, *H. Rept.* No. 4165, 50 Cong., 2 Sess., 1888-1889, pp. 142-144; and also the testimony of Anderson Gratz, *ibid.*, 100-111. According to the testimony, the output curtailment clause was never enforced.

the companies are shown to have maintained agents and to have sold at least a large portion of their own output, it is to be questioned if the joint-selling clause was utilized to any extent. Therefore, the writer has not considered joint-selling a characteristic of the pool, though admitting that his decision may be open to question.

Three times a month the companies were required by the agreement to file with the sales agent statements of coal shipped and sold, or agreed to be shipped and sold. The sales agent furnished the committee on or before the tenth of the month a summary showing the entire quantity sold and shipped during the preceding month. Settlement was made between the parties on the basis mentioned above, *i.e.*, that each party was entitled to the average price for each kind of coal at each place of sale during the preceding month. The general sales agent then drew drafts upon those parties receiving more than the average price in favor of those receiving less. Failures to furnish the appropriate proportions of coal were to be adjusted equitably by the executive committee as between the parties. Presumably this was accomplished by the same method, namely, payments by those shipping more than their proportions to those shipping less.[74]

Outside the Atlantic Conference already considered, two other steamship conferences or agreements are matters of public knowledge at the present writing. One of these relates to freight traffic to and from the United States and Asiatic ports; the other to freight traffic to and from the United States and the ports of Brazil. The two combinations are very similar in character. The former was organized in 1905 and the latter in 1908.

Each of these organizations had an agreement or agreements relating to the division of sailings between the participating lines in both directions. Thus, for example, the "Eastward Agreement" in the Asiatic trade, *i.e.*, Atlantic ports of the United States to Eastern Asiatic ports, divided a total of forty-one sailings among four companies. Two companies secured thirteen sailings each; the other two, eight and seven respectively.[75] Similarly in the Brazilian trade twenty-four sailings each were allotted to Lamport and Holt, the Prince Line and the combined Hamburg Lines,

[74] 68 Pa. St. 173 ff.

[75] Memorandum of Agreement, *U. S.* v. *American Asiatic Steamship Co.* Petition, U. S. D. C. for the Southern District of New York, Exhibit No. 1, pp. 27 ff.

from New York.[76] Besides these traffic agreements there existed in each case an agreement for the pooling of freights. In the case of the Brazilian trade the interest of each of the parties was in proportion to the number of sailings allotted. In the Asiatic Trade the method utilized was exceedingly complicated, too much so for adequate discussion here.[77] In each case a central office was maintained at which the pooling records were kept and the various accounts made up from time to time. In both trades provision was also made for the fixing of rates. In the Asiatic trade this clause is found in the traffic agreements. In the Brazilian trade it appears in the pooling agreement.

Quadruplex Pools

Clearing house, output division, price, and output curtailment.

So far as the information is obtainable, the Wire Nail Association appears to be the most complicated of the pools with which this article deals. Primarily for clearing sales the pool appears, however, to have divided and limited output and also to have fixed prices. First organized in 1895, this combination established prices from a Pittsburgh base adding freight to destination. Profits above the cost price were paid into the pool and were cleared monthly (after paying expenses) upon a certain agreed basis which was the same as that upon which the agreed production was apportioned. This basis was determined partly by the sales for months before the pool was formed, partly upon the production in one of those months and partly upon capacity as indicated by the number of machines. Both prices and output were determined a month in advance.[78]

The writer hopes he has proved that there are striking resemblances and a considerable uniformity in these pools and associa-

[76] Memorandum of Agreement, *U. S.* v. *Prince Line, Ltd. Petition.* In Equity, U. S. D. C. for the Southern District of New York, Exhibit No. 1, pp. 22 ff.

[77] Agreement, *op. cit., U. S.* v. *American-Asiatic Steamship Co.,* Exhibit No. 3, pp. 38 ff., and Agreement, *op. cit., U. S.* v. *Prince Line, Exhibit,* No. 2, pp. 25 ff.

[78] Egerton, C. E., "Wire Nail Association of 1895-1896," *Political Science Quarterly,* vol. XII (1897), pp. 246-272, reprinted in Ripley, pp. 46-72. It is interesting to note that the gentleman who engineered this association also organized the more recent Fibre and Manila Association and the Paperboard Association. Facts accessible are not sufficient to allow discussion of these pools. Available information leads one to think that the pooling plan of these two associations was very similar to that of the Wire Nail Association.

tions. In conclusion, it is evident that the pool is far from being a discarded form of organization. In view of the numerous pools of comparatively recent date, one is almost tempted to believe that this form of organization is more utilized than ever before in our history. If this be so, some estimates of the pool as an unsatisfactory type of combination ought to be revised.

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